SUPREME COURT, U. S.

APR 23 1969

JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1305

JARVIS E. GOOCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT B. THOMPSON
Gainesville, Georgia
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106. HArrison 1-3030

INDEX

Reference to Official Report 1
Grounds of Jurisdiction 2
Questions Presented 2
Constitutional Provisions and Statutes Involved 3
Statement of the Case 4
Reasons for Granting the Writ 6
Conclusion 11

Appendix—

Decision of the United States Court of Appeals, Fifth Circuit, August 14, 1968 ..... A1
Judgment, August 14, 1968 ..... A7
Decision of the United States Court of Appeals, Fifth Circuit, March 26, 1969 ..... A8
Judgment, March 26, 1969 ..... A13
Certificate A14

Table of Cases

Miranda v. *Arizona*, 384 U.S. 436 ..... 3, 6, 10
United States v. *Gainey*, 380 U.S. 63 ..... 6, 7, 8, 11
United States v. *Romano*, 2 Cir., 380 F.2d 566, affirmed *United States* v. *Romano*, 382 U.S. 136 ..... 6, 9

Constitutional Provisions and Statutes

Constitution of the United States, Fifth Amendment 3, 11
26 U.S.C. 5601(a)(4) 3, 4, 10
26 U.S.C. 5601(b)(2) 3, 7, 9, 11
26 U.S.C. 5601(a)(8) 3, 4
26 U.S.C. 5601(b)(4) 3, 4, 7, 8, 9, 10, 11
26 U.S.C. 5601(b)(3) 6
26 U.S.C. 5601(b)(1) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

JARVIS E. GOOCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is not yet officially reported. Copies of the official opinions in this case are appended hereto.

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, *Jarvis E. Gooch* v. *United States of America,* No. 24,786, is dated March 26, 1969. An earlier opinion in the same case, dated August 14, 1968, was withdrawn by the Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under and by virtue of Title 18, U.S.C. 3772, within the time provided for in Rule XI and Rule 22(2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law of gravity and importance in the administration of criminal justice which has not been, but should be settled by this Court. Said Court has misconstrued and misapplied decisions of this Court and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTIONS PRESENTED

1.

Do the statutory presumptions authorizing convictions on charges of carrying on the business of a distiller and producing distilled spirits from mash, contained in 26 U.S.C. 5601(b)(2) and 5601(b)(4), alone, arising from mere presence at a distillery, justify a conviction for those offenses?

2.

In the light of the ruling of this Court in *Miranda* v. *Arizona*, 384 U.S. 436, that an accused has the right to stand mute and claim his privilege of silence in the face of accusation, are the presumptions created by 26 U.S.C. 5601(b)(2) and 5601(b)(4) constitutionally valid, or do they infringe upon the right to remain silent when accused, guaranteed by the Fifth Amendment to the Constitution of the United States?

(d)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . .".

Title 26, Section 5601(a)(4), United States Code:

> "Offenses. —Any person who— . . . carries on the business of a distiller or rectifier without having given bond as required by law; . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

Title 26, Section 5601(b)(2), United States Code:

> "Failure or refusal of distiller or rectifier to give bond. —Whenever on the trial for a violation of subsection (a)(4), the defendant is shown to have been at a site or place where, at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the Court when tried without a jury)."

Title 26, Section 5601(a)(8), United States Code:

> "Offenses. —Any person who— . . . not being a distiller authorized by law to produce distilled spirits, produces distilled spirits by distillation or by any other process from any mash, wort, wash or other material; . . . shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

Title 26, Section 5601(b)(4), United States Code:

> "Unlawful production of distilled spirits. —Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the Court when tried without a jury)."

(e)

STATEMENT OF THE CASE

Petitioner was convicted on three counts of a multiple count indictment, charging violations of the Internal Revenue Laws relative to distilled spirits. Since the Court of Appeals did not specifically rule upon the sufficiency of the evidence as to one count, only two of the counts are involved here. Count One of the indictment charged that the petitioner carried on the business of a distiller of spirituous liquors without having given bond as required by law, in violation of 26 U.S.C. 5601(a)(4). Count Three of the indictment charged that he, not being a distiller authorized by law to produce distilled spirits, did unlawfully produce distilled spirits from mash and other materials, in violation of 26 U.S.C. 5601(a)(8).

As the evidence relates to petitioner, it shows that Alcohol Tax Agents arrived at an unregistered distillery in Lumpkin County, Georgia. Investigation of the immediate area disclosed that there was a dwelling house fronting on Highway 19. This was the residence of Mrs. Hoyt Lance and her son, one Timothy Lance. A water pump which supplied water to the dwelling house, was located in a spring about 170 yards from the dwelling house. A pathway led from the dwelling house to the pump and the distillery was located off the pathway approximately 150 feet from the dwelling house and about 20 feet from the distillery. There were electric wires running from the dwelling house to the pump. The electricity for the distillery and other pumps located at the distillery was furnished by a wire running from the aforesaid electric wire to the distillery.

A plastic hose ran between the smokehouse and the distillery. This hose was used for the purpose of pumping distilled spirits from the distillery to the smokehouse by means of a pump located at the distillery. When the officers arrived at the distillery, this pump was operating and was pumping whiskey from the distillery to the smokehouse.

While the officers were at the distillery, they heard someone cough and saw a light coming down the path. The agents, or some of them, concealed themselves to the rear of the distillery. From that point, they observed petitioner come down the path with a flashlight in his hand. As he walked down the path, he shined the light around the distillery yard, but continued walking toward the spring where the pump supplying water to the dwelling house was located. He "did something to the electric switch" according to the testimony of one of the officers and the water pump, supplying water to the dwelling, be-

gan operating. Petitioner testified that he put a fuse in the switch box.

Following this, petitioner walked back up the path and when he reached the distillery, he walked off the path and into the distillery where he was immediately arrested.

The evidence offered on behalf of petitioner to explain his presence at the time and place was to the effect that the Lances were long time friends. He went to their residence for the purpose of visiting with them and was told that the water pump which supplied water to the dwelling house was not working. Asked to see if he could assist in the situation, he went to the pump and made the necessary adjustments. After completing this project, on his way back to the house, out of curiosity, he walked into the distillery yard to observe the contraption.

REASONS FOR GRANTING THE WRIT

The decision of the Court below has decided an important question of federal law which is contrary to the decisions of this Court in *United States* v. *Gainey,* 380 U.S. 63, and *United States* v. *Romano,* 382 U.S. 136. Insofar as the decision of the Court below is based upon the absence of sufficient explanation to explain petitioner's presence at the distillery site, it is contrary to and inconsistent with the rationale of the decision of this Court in *Miranda* v. *Arizona,* 384 U.S. 436.

Under the facts of this case, the Court of Appeals found some difficulty in deciding upon a basis to affirm the judgment. In its opinion of August 14, 1968, it affirmed the conviction as to Count One, the "carrying on the business" count, and reversed the convictions on Counts Two and Three. The reversal on Count Two, which is not at issue here, was based upon the unconstitutionality of the statutory presumption contained in 26 U.S.C. 5601(b)(3).

The reversal as to Count Three was based upon the unconstitutionality of the presumption contained in 26 U.S.C. 5601(b)(4). However as to the latter count, the appellate court erroneously construed the record to show that the trial court had instructed the jury with reference to the latter presumption.

By its opinion of March 26, 1969, the Fifth Circuit withdrew the earlier opinion and affirmed the conviction. The affirmance as to Count One was based solely upon the presumption contained in 26 U.S.C. 5601(b)(2). With reference to Count Three, the Court expressed "serious doubt as to whether a person could be convicted solely upon the strength of this presumption" [26 U.S.C. 5601(b)(4)]. However, the Court, in order to avoid the necessity of deciding that issue, held that the conviction was justified upon a finding by the jury that petitioner "started the pump which was pumping the already distilled spirits from the still site to what was apparently a surge tank at the bottling shed". This holding by the Court was but a method of avoiding a constitutional issue, because the record shows without dispute that the pump which was pumping the already distilled spirits from the still site to the surge tank in the smokehouse was operating when the officers first arrived on the scene and before the appearance of petitioner. In this regard, when asked if the pump that was at the spring, that is the pump which supplied water to the dwelling house, was operating when petitioner came on the scene, the government witness replied, "I don't believe it was operating at the time we went up there. The pump at the whiskey there was operating, but later on we heard the water pump go on." (R 100).

In *United States* v. *Gainey*, 380 U.S. 63, this Court held that the statutory presumption created by 26 U.S.C. 5601(b)(2) was a valid presumption; however, this Court stated further:

> "We do not interpret the provisions of the statute that unexplained 'presence . . . shall be deemed sufficient evidence to authorize conviction' as in any way invading the province of the judge's discretion. The language permits the judge to submit a case to the jury on the basis of the accused's presence alone, and to this extent it constitutes congressional recognition that the fact of presence does have probative worth in the determination of guilt. But where the only evidence is of presence, the statute does not require the judge to submit the case to the jury, nor does it preclude the grant of a judgment notwithstanding the verdict. And the Court of Appeals may still review the trial judge's denial of motions for a directed verdict or for a judgment n.o.v."

It would be difficult to imagine a factual situation falling more in line with the above suggestion of this Court. In the quotation, this Court was referring to "unexplained presence". In the present case, presence is explained without contradiction, in a manner completely consistent with innocence.

To say the most, the presumption creates a circumstantial evidence case. As the evidence shows, the presence at the distillery was so fleeting as to be tantamount to a mere passing through, as opposed to such presence as would create any inference that petitioner was in any way connected with the distillery.

We submit that the facts of this case coincide absolutely with the language from *Gainey*, quoted above. In order that the Courts might uniformly administer justice and apply the "presumption statutes", this Court should grant certiorari and enunciate the application of the rule quoted above to cases involving nothing more than mere presence at an unlawful distillery.

As for Count Three of the indictment, it is to be noted that the presumption contained in 26 U.S.C. 5601(b)(4)

is applicable only when the accused is present at a distillery site *at a time when distilled spirits are produced.* Even so, the First Circuit has held this presumption to be unconstitutional. *United States* v. *Romano,* 2 Cir., 330 F.2d 566, affirmed *United States* v. *Romano,* 382 U.S. 136. As we have shown, the holding of the Fifth Circuit that there was evidence to have supported the jury in finding beyond a reasonable doubt that petitioner started the pump which was pumping the distilled spirits is erroneous. Thus, the only evidence present in the record to support the conviction on Count Three is the mere presence of petitioner at the distillery site.

In any event, a condition precedent to the invocation of this presumption is not established by the evidence. It would appear to be a complete argument on this count that the evidence fails to disclose that petitioner was at the distillery *at the time when* distilled spirits were produced. In view of this state of the record, the presumption created by 26 U.S.C. 5601(b)(4) should not be held applicable. In order for the evidence to bring petitioner within the ambit of this provision, it is essential that the evidence show that he was present at the distillery at a time when the distilled spirits were produced. There is absolutely no evidence that he participated in or aided and abetted in the production of distilled spirits from the mash.

There is no evidence in the record that petitioner had anything to do with the distilling of the spirits found at the distillery. The statutory presumption alone would have to supply this deficit in the evidence.

As was pointed out by this Court in *United States* v. *Romano,* supra, referring to its sustaining the validity of 26 U.S.C. 5601(b)(2), and holding unconstitutional 26 U.S.C. 5601(b)(1), this Court observed:

> "Presence at an operating still is sufficient evidence to prove the charge of 'carrying on' because anyone present at the site is very probably connected with the illegal enterprise. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. Section 5601(a)(1), however, proscribes possession, custody or control. This is only one of the various aspects of the total undertaking, many of which have nothing at all to do with possession, as *Bozza* made quite clear and as the United States conceded in that case. Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with the possession, rather than in one of the supply, delivery or operational activities having nothing to do with the possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary. . . .' *Tot* v. *United States,* 319 U.S. 463."

By logic, reason and law, the above analysis is a complete answer to any contention the United States might offer to sustain the constitutionality of 26 U.S.C. 5601(a)(4).

We respectfully submit that this Court should grant certiorari for the purpose of determining the constitutional validity of the presumption created by 26 U.S.C. 5601(b)(4).

With regard to question 2, presented above, we respectfully submit that in the light of *Miranda* v. *Arizona,* 384 U.S. 436, this Court should review and overrule its de-

cision in *United States* v. *Gainey*, 380 U.S. 63. It is to be noted that both of the presumption statutes relevant here, 26 U.S.C. 5601(b)(2) and 5601(b)(4), authorize a conviction, based solely upon the presence of a defendant at a distillery site, "unless the defendant explains such presence to the satisfaction of the jury". In view of the uncontested privilege against self-incrimination accorded by the Fifth Amendment to the Constitution of the United States and the recognized fact that this privilege is "satisfied only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will", it would appear that the presumption statutes place the accused in an uncompromising position. Either he must chance a conviction based solely upon the presumption or he must explain his presence at the distillery site, perhaps in a manner which would incriminate him.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erred in the respects herein urged.

Respectfully submitted,

ROBERT B. THOMPSON
Attorney for Petitioner

P. O. Box 679
Gainesville, Georgia 30501

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24786

TIMOTHY B. LANCE and JARVIS E. GOOCH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(August 14, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge

EDENFIELD, District Judge: Appellants were each convicted in the Northern District of Georgia on three counts connected with the operation of an illegal distillery in and near which they were arrested.

Appellant Gooch was arrested under the following circumstances:

Alcohol Tax agents arrived at the site of a recently discovered illegal distillery, hidden deep in the woods on property adjoining that of appellant Lance's mother, at about 8:15 P.M. on July 14, 1966. While examining the still, they had to conceal themselves in some nearby shrubbery upon hearing and seeing that someone was coming down a path toward the distillery. The person passed by the distillery area, which was off to the side of the main path, and continued down toward a spring that was fifty feet beyond the distillery. After performing some minor mechanical or electrical operation at the spring, the nature of which is not absolutely clear from the record, the person came back up the trail and, departing from the main path, came into the still yard, where he was arrested when he shined his light on the hidden officers. The person arrested was appellant Gooch.

At the trial, Gooch claimed that he had gone to the spring near the still yard to restart a water pump which pumped water from the spring to the adjoining houses of his friend Lance and Lance's mother. (Unfortunately, the best real evidence of what Gooch may have been doing was destroyed when the investigators dynamited the still and supporting equipment in the vicinity and apparently rearranged the wiring that supplied electricity to all the equipment at the spring.)

The jury apparently found his story unconvincing and convicted Gooch on three counts: of carrying on a distilling business without having posted bond, a violation of 26 U.S.C. § 5601(a)(4); of illegally producing mash, a violation of 26 U.S.C. § 5601(a)(7); and of illegally producing spirits, a violation of 26 U.S.C. § 5601(a)(8). Gooch now attacks these convictions on the ground that the only evidence in support of each of them was fur-

nished by a statutory presumption and that either the presumption is itself unconstitutional or was unjustifiably charged.

The first count is supported by a presumption spelled out in 26 U.S.C. § 5601(b)(2).[1] This presumption has been held to be constitutionally permissible, there being a rational connection between the facts proved and the ultimate fact assumed. *United States* v. *Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed. 2d 658 (1965). Gooch's attack is thus limited to a contention that his presence at the still was so fleeting and otherwise so satisfactorily explained that there was no room in which the presumption could operate. The statute specifically makes the question of whether a defendant's explanation is a satisfactory one for the jury. In this case it could assess not only his demeanor and appearance, but his past record in the illegal liquor business and his familiarity with the still site. These were all factors weighing against his explanation. There was clearly a proper question here for the jury and we cannot say that their resolution of it against appellant was without any basis at all. Therefore, the conviction on this count must be affirmed.

The second conviction (on the "mash count") was entirely based on a statutory presumption, 26 U.S.C. § 5601(b)(3).[2] One of the four still pots found at the site

1. "Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

2. "Whenever on trial for violation of subsection (a) (7) the defendant is shown to have been at the place in the building or on the premises where such mash, wort, or wash fit for distillation or the production of distilled spirits, was made or fermented, and at the time such mash, wort, or wash was there possessed,

was charged with a load of fermenting mash at the time Gooch was arrested. However, there was no evidence at all other than his presence to indicate that he was connected in any way with that pot of mash. The presumption allows presence alone in the vicinity of an illegal mash pot to be proof of illegally making mash, which is the actual offense. Such a presumption goes too far. We believe the reasoning in *United States* v. *Romano*, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed. 2d 210 (1965), is fully applicable to this situation. There it was held that mere presence at an illegal distillery could not constitutionally create a presumption that that individual was in possession, custody or control of the still because there was too remote a connection between the fact proved and the fact assumed. If mere presence cannot imply possession of an entire distillery, still less can it imply doing a single one of the several acts that may be connected with making liquor in that distillery. There being no evidence to support the conviction other than the statutory presumption, and the statute being in violation of the Due Process Clause of the Fifth Amendment, the conviction on Count Two must be reversed.

A similar situation must prevail with regard to Count Three, although for slightly different reasons. The conviction on Count Three (making distilled spirits) was supported by evidence from which the jury could have inferred that Gooch had started a pump while at the spring area which pumped already distilled spirits from a storage tank at the still to a bottling operation several hundred feet away. However, the trial court charged that Gooch's mere presence at the time and place at which

---

such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

illegal distilled spirits were being produced by distillation or any other process[3] created a presumption that Gooch himself was producing illegal distilled spirits by distillation or any other process, which is the actual offense charged. Such a statutory presumption is unconstitutional for exactly the same reasons as were applied to the presumption arising from his being in the presence of mash. Despite the presence of the other evidence,[4] the jury may have decided the question against the defendant on the presumption alone, since the other evidence might have been found inconclusive. Thus the charging of an unconstitutional presumption may have worked serious

3. 26 U.S.C. § 5601(b)(4): "Whenever on trial for violation of subsection (a) (8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

4. Whether the act of pumping already distilled spirits to a bottling operation would be an offense under the statute is a close question. The act makes the *production* of distilled spirits by distillation *or any other process* an offense. Clearly, *distilled spirits* may only be initially *created* by distillation unless some modern-day Philosopher's Stone has been found of which the court remains unaware. If the words "any other process" have any significance, as we must assume they do, clearly they could refer to an operation *after* distillation so necessary to get the product into saleable form as is the pumping in question here. We do not find persuasive the Government's argument that making mash (even if it could be proved by actual evidence that Gooch did so, which is not the case here) can be used as evidence to support a conviction for making distilled spirits. This argument rests on the fact that alcohol exists in the mash, and whether it has gone through a distillation process is immaterial. Wood v. United States, 250 F. Supp. 995 (D.C. S.C., 1966), on which the Government relies, is clearly distinguishable. Wood was purely a tax case, and the definition of "distilled spirits" found in 26 U.S.C. § 5002(a)(6) was controlling. Here however, we have a distilled spirits offense clearly distinguished in the statute from an offense for making mash. The Government's theory would allow making mash alone to *always* be proof of also making distilled spirits, although the converse would not necessarily be true. We can find no such curious result justified by the clear provisions of 26 U.S.C. § 5601(a), considered as a whole.

injury to the defendant and the conviction on Count Three must be reversed.

Appellant Lance's argument as to each of the counts on which he was convicted hinges on the legality of his arrest and the subsequent warrantless search of a small building in which he was caught wet-handed, filling plastic jugs with whiskey from a hose. The officers who had arrested Gooch at the still site had followed the hose through which the liquor was being pumped through the woods to the vicinity of the building. There was evidence from which the trial judge could have found that Lance was then in plain view of the officers through an open door. The officers entered the building and placed Lance under arrest. Such an arrest is clearly legal, although it may involve entering the building to actually put the person in custody. It required no search to see the contraband lying about within the building. We can find no basis for concluding that the motion to suppress was erroneously denied. *United States* v. *Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); *United States* v. *Williams,* 351 F. 2d 475 (6th Cir., 1965); *United States* v. *Shew,* 324 F. 2d 733 (4th Cir., 1963); *United States* v. *Young,* 322 F. 2d 443 (4th Cir., 1963); *Martin* v. *United States,* 155 F. 2d 503 (5th Cir., 1946).

The decision of the District Court as to appellant Lance is therefore affirmed.

In accordance with the above, the judgment of the District Court is REVERSED in part and AFFIRMED in part.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24786

D. C. Docket No. Cr. 5503

TIMOTHY B. LANCE and JARVIS E. GOOCH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed in part, in accordance with the opinion of this Court.

August 14, 1968

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24786

TIMOTHY B. LANCE and JARVIS E. GOOCH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(March 26, 1969)

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge.

EDENFIELD, District Judge: The opinion of the Court previously issued in this case on August 14, 1968, is hereby withdrawn and the following opinion is substituted:

Appellants were each convicted in the Northern District of Georgia on three counts connected with the operation of an illegal distillery in and near which they were arrested.

Appellant Gooch was arrested under the following circumstances:

Alcohol Tax agents arrived at the site of a recently discovered illegal distillery, hidden deep in the woods on

property adjoining that of appellant Lance's mother, at about 8:15 P.M. on July 14, 1966. While examining the still, they had to conceal themselves in some nearby shrubbery upon hearing and seeing that someone was coming down a path toward the distillery. After performing some minor mechanical or electrical operation in the area of a nearby spring, the nature of which is not absolutely clear from the record, the person came back up the trail and, departing from the main path, came into the still yard, where he was arrested when he shined his light on the hidden officers. The person arrested was appellant Gooch.

At the trial, Gooch claimed that he had gone to the spring near the still yard to restart a water pump which pumped water from the spring to the adjoining houses of his friend Lance and Lance's mother. The evidence as a whole showed that the water pump was connected via a switch box near the spring to an electric power source at the residences. From the switch box, which was near the water pump, electric lines ran to the distillery area and serviced the equipment. Among the distillery equipment examined a few moments after the officers arrested Gooch was an electric pump which was pumping illegal liquor from a large metal tank to a shed near the residence. The pump was still operating at that time and had drawn the liquor level down approximately one inch. The continuing decrease was visible to the naked eye. Although there was no explicit testimony as to when the liquor pump had begun to run, the evidence clearly supported at least an inference that it was while Gooch was in the area of the switch box and not visible to the officers.

The three counts on which Gooch was convicted were for violations of 26 U.S.C. § 5601(a)(4), carrying on the business of a distiller without having posted bond; 26 U.S.C. § 5601(a)(7), illegally producing mash; and 26

U.S.C. § 5601(a)(8), illegally producing spirits. He received concurrent sentences of one year on each of the first two counts and one year on probation on the third count. He attacks each conviction primarily on the ground of the insufficiency of the evidence.

The evidence as to Count One is supported by a presumption contained in 26 U.S.C. § 5601(b)(2).[1] The evidence showed Gooch's presence at the still beyond any question. Whether all the other evidence provided a satisfactory exculpatory explanation of that presence was a matter for the jury and it apparently found against him. Among the elements it could have considered as weighing against Gooch's story were the coincidental apparent start-up of the pump at the still. Gooch's apparent familiarity with the still site and the area around it, his record of a previous conviction "in connection with the whiskey business" (not to mention a previous conviction for burglary and larceny), and his long-time close association with the Lance family. The other elements so heavily outweigh the story offered by Gooch that when considered together with the presumption afforded by the statute, we can hardly say that the evidence is insufficient as a matter of law to support the conviction. See *United States* v. *Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); *Pinion* v. *United States*, 397 F.2d 27 (5th Cir. 1968); *Hill* v. *United States*, 395 F.2d 694 (5th Cir. 1968); *United States* v. *Gulley*, 374 F.2d 55 (6th Cir. 1967); and compare with *Gilliland* v. *United States*, 385 F.2d 912 (5th Cir. 1967); *Cuthbert* v. *United States*, 278 F.2d 220 (5th Cir. 1960).

---

1. "Whenever on trial for violation of subsection (a) (4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

We can find no merit in Gooch's various other objections to the judgment on Count One.

Under the doctrine first enunciated by Chief Justice Marshall in *Locke* v. *United States*, 7 Cranch 339, 344-45, 3 L.Ed. 364 (1813), and consistently followed thereafter,[2] if the evidence on any one count of a multi-count indictment is sufficient to sustain the verdict, it is not necessary to examine the other counts where the sentences imposed thereon are made to run concurrently. As we find the evidence sufficient to sustain the conviction on Count One, it is not necessary to consider the merits of the conviction on Count Two.

The third, or "spirits", count, is supported by a presumption contained in 26 U.S.C. § 5601(b)(4).[3] We have serious doubt as to whether a person could be convicted solely on the strength of this presumption in view of its dubious constitutionality. Compare *Gainey* with *United States* v. *Romano*, 382 U.S. 136, 15 L.Ed.2d 210, 86 S.Ct. 279 (1965). Therefore, without now relying upon it,[4] but viewing the other evidence as a whole most favorably to the Government, as we should on appeal from a conviction, we find there is sufficient evidence to have supported the jury in finding beyond a reasonable doubt that Gooch started the pump which was pumping the already distilled spirits from the still site to what was apparently a surge

2. E.g., United States v. Trenton Potteries Co., 273 U.S. 392, 71 L.Ed. 700, 47 S.Ct. 377 (1927); Hirabayashi v. United States, 320 U.S. 81, 87 L.Ed. 1774, 63 S.Ct. 1375 (1943); United States v. Gainey, 380 U.S. 63, 13 L.Ed.2d 658, 85 S.Ct. 754 (1965).

3. "Whenever on trial for violation of subsection (a)(8) the defendant is shown to have been at the site or place where, and at the time when, such distilled spirits were produced by distillation or any other process from mash, wort, wash, or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury)."

4. The presumption was not charged to the jury.

tank at the bottling shed. This is an integral element in the production of distilled spirits prohibited by 26 U.S.C. § 5601(a)(8), and there was no error in the conviction of Gooch under this count.

Appellant Lance's argument as to each of the counts on which he was convicted hinges on the legality of his arrest and the subsequent warrantless search of a small building in which he was caught wet-handed, filling plastic jugs with whiskey from a hose. The officers who had arrested Gooch at the still site had followed the hose through which the liquor was being pumped through the woods to the vicinity of the building. There was evidence from which the trial judge could have found that Lance was then in plain view of the officers through an open door. The officers entered the building and placed Lance under arrest. Such an arrest is clearly legal, although it may have involved entering the building to actually put the person in custody. It required no search to see the contraband lying about within the building. We can find no basis for concluding that the motion to suppress was erroneously denied. *United States* v. *Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); *United States* v. *Williams*, 351 F.2d 475 (6th Cir. 1965); *United States* v. *Shew*, 324 F.2d 733 (4th Cir. 1963); *United States* v. *Young*, 322 F.2d 443 (4th Cir. 1963); *Martin* v. *United States*, 155 F.2d 503 (5th Cir. 1946).

The decision of the District Court as to appellants Lance and Gooch is therefore AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 24786

D. C. Docket No. Cr. 5503

TIMOTHY B. LANCE and JARVIS E. GOOCH,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before GEWIN and THORNBERRY, Circuit Judges, and EDENFIELD, District Judge

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 26, 1969

Issued as Mandate:

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Jarvis E. Gooch were deposited with the United States Post Office with airmail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington 25, D. C.; and to United States Attorney, Northern District of Georgia, Old Post Office Building, Atlanta, Georgia.

This the 22nd day of April, 1969.

.....

ROBERT B. THOMPSON

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1305

JARVIS E. GOOCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 8–12; II R. 248–253)[1] is not yet reported. An earlier opinion of the court of appeals, subsequently withdrawn, is also included in the appendix to the petition (Pet. App. A 1–6; II R. 239–245).

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1969 (Pet. App. A 13; II R. 254). The petition for a writ of certiorari was filed on April 23,

[1] "R." preceded by volume number designates the two-volume record on file with the Clerk of this Court.

351-081—69

1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted for violation of provisions of the Internal Revenue Code relating to illegal distilling operations.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on three counts of a five count indictment charging illegal distilling operations in violation of the Internal Revenue Code.[2] Count one charged carrying on the business of a distiller without having posted bond (26 U.S.C. 5601(a)(4)); count two, illegal production of mash (26 U.S.C. 5601(a)(7)); and count three, illegal production of distilled spirits (26 U.S.C. 5601(a)(8)) (IR. 1–3, 4, 29). On May 8, 1967, petitioner was sentenced to concurrent terms of one year's imprisonment on counts one and two, and, on count three, to one year of probation, to commence after the completion of his prison term (IR. 30–32). The court of appeals affirmed (Pet. App. A 8–12).

[2] Three others were tried together with petitioner. Roy Lance and Freeman W. Rider were acquitted on all counts; Timothy Lance was acquitted on count two and three; and petitioner was acquitted on counts 4 and 5 charging the possession of 413 gallons of alcohol which did not have the requisite stamps and carrying on the business of a distiller with the intent to defraud the United States of the tax imposed thereon (IR 29–30).

The evidence is summarized in the opinion below (see Pet. App. A 8–9). In relevant part, it showed that at about 8 p.m. on the evening of July 14, 1966, four agents arrived at a recently discovered illegal distillery in Lumpkin County, Georgia. The still was located in woods adjacent to the residence of the mother of two of the defendants (Roy and Timothy Lance) (IR. 87, 96, 115). While two of the agents were examining the still site they saw petitioner coming down the path. After doing "something" to an electrical switch in the area of a nearby spring, petitioner proceeded to the distillery site with his flashlight and was there arrested (IR. 116, 123–124, 87–88). The evidence further showed that there was a switch box near the spring, containing an electric power source which could be activated to pump water into the Lance residence (IR. 98–99). This power box could also be used to activate a pump at the distillery to pump liquor from a large metal tank through a hose running to a nearby shed (IR. 99). At trial, petitioner testified that just before his arrest he had fixed the water pump by putting a fuse in the switch box (IR. 147–149, 150). Moments after petitioner's arrest the alcohol pump was running and the level in the tank was down about an inch, indicating that it had been activated only moments before (Pet. App. A 9; IR. 116–117, 88–89). The still itself had just finished operating (IR. 95). At the still site the officers found 4 fifteen hundred gallon still pots and about forty-five hundred gallons of mash fit for distillation (IR. 93–94, 108, 121).

In his instructions to the jury, the trial judge charged as to count one (the "carrying on the business" count) that if

> * * * a defendant is shown to have been at the site of the place where and at the time when such offense was being committed, the presence of such defendant at said time and place shall be deemed sufficient to authorize a conviction, unless the facts and circumstances and evidence explains such presence to the satisfaction of the jury.
>
> Of course, if his presence there, if anyone was present, is believed by you to be for some innocent purpose, then the rule would not apply.
>
> This does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict such defendant if the evidence in the case and the facts and circumstances proved failed to explain his presence to the satisfaction of the jury, it simply means that the jury may, if it sees fit, convict upon such evidence, and it shall be deemed sufficient in law to authorize a conviction, but does not require such a result. [Inst. 10–11.] [3]

ARGUMENT

The court of appeals properly upheld petitioner's conviction for carrying on the business of a distiller as charged in count one. The circumstances in which an inference of guilt may permissibly be drawn from presence [4] with regard to that offense was correctly

[3] "Inst." refers to a copy of the court's instructions which we are filing herewith.

[4] The court below found that the "evidence showed Gooch's presence at the still beyond any question" (Pet. App. A 10), and the record supports that conclusion.

set forth in the trial court's instructions, and the rationality of that inference was squarely sustained by this Court in *United States* v. *Gainey,* 380 U.S. 63. The fact that petitioner at trial offered an explanation for his presence did not make the instruction any less valid (see Pet. 7–8). As the trial judge pointed out, it was for the jury to decide whether petitioner was present "for some innocent purpose" (Inst. 10). The further contention that the inference is invalid under the self-incrimination clause of the Fifth Amendment was also rejected in *Gainey, supra,* 380 U.S. at 71, and petitioner submits no reason why that decision should be reexamined. *Miranda* v. *United States,* 384 U.S. 436 is inapposite, since that case relates to the entirely different question of voluntariness of statements made in the context of custodial interrogation.[5]

Petitioner's conviction under count three—unlawful production of liquor on which the federal tax had not been paid—was also valid in the circumstances. The jury was not instructed that they could convict on this charge on the basis of presence alone. Accordingly, it would be inappropriate to decide in this case whether the statute rationally authorizes the jury to convict a defendant for illegal production of distilled spirits (26 U.S.C. 5601(a)(8)) when it finds that he has failed sat-

[5] Petitioner does not challenge the court of appeals' failure to review his conviction under count two—illegal production of mash fit for distillation—upon which he received a concurrent sentence. Accordingly, there is no reason to defer ruling on the instant petition pending this Court's decision in *Benton* v. *Maryland*, No. 201, this Term, involving the question of the continuing validity of the concurrent sentence doctrine.

isfactorily to explain his presence at the place where such spirits are being produced (26 U.S.C. 5601(b)(4))—an issue which was before this Court but not decided in *United States* v. *Romano,* 382 U.S. 136. There was, as the court of appeals held, sufficient evidence independent of the inference to support the jury's verdict. Petitioner was present at the switch box which controlled the liquor pump at about the time the evidence suggests that pump was in fact activated; the jury could reasonably conclude that it was petitioner who started that pump in operation (See Pet. App. A 11–12).[6] Such activity would be encompassed within any reasonable construction of the statutory provision relating to production of liquor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

MAY 1969.

[6] The testimony of one of the agents suggesting that the water tank had been activated after the agents came upon the scene (I R 100–101, 122) is consistent with petitioner's version that he had activated the water pump. However, this is not inconsistent with the conclusion that petitioner had also activated the liquor pump. See, for example, petitioner's own testimony that the liquor pump went on just *after* his arrest (I R 152).

U.S. GOVERNMENT PRINTING OFFICE: 1969